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No. 85-1821

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

STATE OF UTAH, DUCHESNE COUNTY, UTAH, UINTAH COUNTY, UTAH, ROOSEVELT CITY AND DUCHESNE CITY, UTAH,
Petitioners,

v.

UTE INDIAN TRIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SANTA FE MINING, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

Santa Fe Mining, Inc. ("Santa Fe") hereby respectfully moves for leave to file the enclosed Brief *Amicus Curiae* in support of the Petition for Writ of Certiorari in this case. The consent of attorneys for the Petitioners has been obtained. The consent of the attorney for the Respondent was requested but refused. As grounds for this Motion, Santa Fe states that it has an interest in the case because:

1. Santa Fe owns substantial real property interests located in the State of New Mexico within an area temporarily set aside in 1907 and 1908 as an extension of the Navajo Indian Reservation and subsequently, in 1908 and 1911, "restored to the public domain."

2. Santa Fe is named as a defendant and representative of an asserted class of non-Indian landowner defendants in *Navajo Tribe of Indians v. State of New Mexico*, United States District Court No. CIV 82-1148JB (D.N.M.), *on appeal*, Tenth Circuit Court of Appeals Nos. 84-1418 and 84-1764, where the Navajo Tribe of Indians seeks to assert, in addition to claims to title, civil and criminal jurisdiction over approximately 1.9 million acres of land within New Mexico that were ordered "restored to the public domain" by Congress and subsequent actions of Executive officials.

3. Like the Petitioners, Santa Fe was unaware until recently of any contention by an Indian tribe that its lands remained part of an Indian reservation.

4. If the *en banc* decision of the United States Court of Appeals for the Tenth Circuit in this case stands, it may impair Santa Fe's ability to protect the present applicability of state, rather than federal or tribal, law, regulation, and, possibly, taxation to its activities and property interests in the approximately 1.9 million acre area claimed by the Navajo Tribe to be part of its Reservation.

5. For these reasons, this Motion for Leave to File a Brief *Amicus Curiae* should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether an allotment era statute providing that Indian reservation lands be "restored to the public domain," in light of recognized, contemporaneous understandings of that phrase and of related public land law principles, clearly expresses a Congressional intention to disestablish the affected reservation.

2. Whether a statute providing that Indian reservation lands be "restored to the public domain," that terminated all tribal interest in the affected lands, and that legislative history, surrounding circumstances, and subsequent Congressional and Executive jurisdictional treatment reflect was intended to terminate all reservation attributes of the affected lands, must be interpreted as preserving reservation status solely because Congress did not express a further and separate intention to disestablish reservation boundaries.

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BRIEF *AMICUS CURIAE* OF SANTA FE MINING, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI

The *amicus curiae*, Santa Fe Mining, Inc., respectfully prays that a Writ of Certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 17, 1985, and reported at 773 F.2d 1087.

OPINION BELOW AND JURISDICTION

The opinion of the Court of Appeals and the grounds underlying this Court's jurisdiction are described adequately in the Petition for Writ of Certiorari of the Petitioners, State of Utah, Duchesne County, Utah, Uintah County, Utah, Roosevelt City and Duchesne City,

Utah (collectively referred to as "Petitioners" or "Utah"), filed May 5, 1986.

INTEREST OF THE *AMICUS CURIAE*

Santa Fe Mining, Inc. ("Santa Fe"), a Kansas corporation, owns substantial real property interests located within an area in northwestern New Mexico described in Executive Order 709 (November 9, 1907) (Roosevelt, T.), reproduced in the Appendix to this Brief Amicus Curiae ("S.F. App.") 1a, as amended by Executive Order 744 (January 28, 1908) (Roosevelt, T.). In New Mexico, Executive Orders 709 and 744 withdrew from sale and settlement lands lying to the east and south of the previously existing Navajo Reservation, subject to "any existing valid rights," as an addition to the Navajo Reservation. The administrative record establishes that the withdrawal would be temporary, lasting only until individual Navajo tribal members residing in the area had received allotments. Following completion of the allotment process and pursuant to the Act of May 29, 1908, § 25, 35 Stat. 444, 457 ("1908 Act"), Executive Orders 1000 (December 30, 1908) (Roosevelt, T.) and 1284 (January 16, 1911) (Taft, W.), "restored [all the unallotted lands within the New Mexico portions of the lands described in Executive Orders 709 and 744] to the public domain." S.F. App. 2a-3a. Since that time, Congress, Executive officials, Santa Fe and, until recently, the Navajo Tribe have not recognized the restored lands as part of the Navajo Reservation.

Relying in part upon the decision below, the Navajo Tribe presently claims that the roughly 1.9 million acres of lands "restored to the public domain" by Executive Orders 1000 and 1284 ("Executive Order 709-744 Area") remain part of the Navajo Reservation. Santa Fe is named as a defendant and representative of an asserted class of non-Indian landowner defendants in *Navajo Tribe of Indians v. State of New Mexico*, United States

District Court No. CIV 82-1148 JB (D.N.M.), *on appeal*, Tenth Circuit Court of Appeals Nos. 84-1418 and 84-1764, *cited in* Petition, 12 n.27. In that case and in other presently pending litigation, the Navajo Tribe seeks to assert, in addition to other claims, a claim to establish that it has civil and criminal jurisdiction over the Executive Order 709-744 Area. Consequently, Santa Fe's lands are subject to claims that appear similar to those presented with respect to the Uncompahgre Reservation in this action.[1]

Like the Petitioners in this case, Santa Fe has considered its properties to lie outside of any Indian reservation. Santa Fe long has understood New Mexico law to define the incidents of its land ownership and its rights and duties with respect to that land, and the State of New Mexico alone to have jurisdiction over its properties. The decision below threatens these long-held expectations.

The decision below, holding that the Uncompahgre Reservation survived passage of the Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38 ("1894 Act"), as implemented by the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 ("1897 Act"), notwithstanding the temporary nature and limited purpose of the original Executive Order reservation and a Congressional intention to restore the lands to public domain status, may affect adversely Santa Fe's interest in the continued jurisdiction of the State of New Mexico over lands also "restored to the public domain."

Should the decision below stand, not only will Utah be confronted with a substantial reservation where none

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[1] This Brief *Amicus Curiae* will address only those portions of the decision below pertaining to the Uncompahgre Reservation. While important distinctions exist between the histories of the Uncompahgre Reservation and the Executive Order 709-744 Area, even greater differences exist between the pertinent histories of the Uintah Reservation and the Executive Order 709-744 Area. Santa Fe, while it joins Petitioner in urging that the decision below respecting the Uintah Reservation be reversed, will not address the propriety of the decision below concerning the Uintah Reservation.

previously was understood to exist, but also the jurisdictional status of significant portions of other states, including New Mexico, would be called into question where neither Congress nor Executive officials intended or recognized continued reservation status. *See* Petition, 11 n. 25 & 26, 12. The resulting jurisdictional uncertainty will prejudice Santa Fe, other landowners, and state and local governments in areas long considered outside of Indian reservation boundaries because Congress or the Executive branch had restored the area to the public domain.

STATUTORY PROVISIONS INVOLVED

Act of June 15, 1880, ch. 223, 21 Stat. 199, *reprinted at* Pet. App. 294a.

Act of August 15, 1894, ch. 290, 28 Stat. 286, 337-38, *reprinted at* Pet. App. 311a.

Act of June 7, 1897, 30 Stat. 62, 87, *reprinted at* Pet. App. 313a.

Act of March 11, 1948, 62 Stat. 72, *reprinted at* Pet. App. 351a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING THAT "RESTORED TO THE PUBLIC DOMAIN" BE INTERPRETED AS CONTEMPLATING RESERVATION TERMINATION.

The majority and concurring opinions of the Court of Appeals for the Tenth Circuit improperly construed this Court's decision in *Solem v. Bartlett*, 465 U.S. 463 (1984), to effect a fundamental reversal of this Court's long-standing view that Congress' command that lands be "restored to the public domain," employed in the 1894 Act and carried forward and executed in the 1897 Act, contemplates the termination of any prior "reservation" status. This misapprehension led the court below to conclude erroneously that the phrase "restored to the public domain" is ambiguous and does not constitute express

language of disestablishment. Pet. App. 18a-19a. This Court's decisions governing reservation disestablishment and "Indian country" jurisdiction refute this principle; certiorari should be granted to correct the conflict between the decision below and well-established precedent of this Court.

A. The Decision Below Conflicts with *Solem v. Bartlett* and the Decisions of this Court Interpreting Statutes that Restored Indian Reservation Lands to the Public Domain.

Contrary to the interpretation of the court below,[2] Pet. App. 18a, *Solem v. Bartlett* did not overrule or question this Court's decisions interpreting "restored to the public domain" as contemplating reservation termination.[3] *Solem*, construing a statute merely providing for the sale and disposal for the tribe's benefit of lands within the Cheyenne River Sioux Reservation, neither required nor occasioned reconsideration of the Court's earlier decisions. *Solem* neither interpreted the phrase "restored to the public domain" nor considered a statute that would have that effect. Rather, in two sentences and a single foot-

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[2] The opinions below reflect a failure to grasp the issue presented and its significance. Judge Seymour's concurring opinion reflects a misconception that "public domain," rather than "restored to the public domain," is the operative statutory language requiring interpretation: "Ultimately, I interpret *Solem* to hold that 'public domain' language standing alone is insufficient . . .". Pet. App. 18a. Although Judge Doyle's majority opinion construes the correct phrase, stating "[o]ur conclusion is that the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish . . .", it mistakenly treats the issue presented as concerning "ownership of the land by the tribal group." Pet. App. 11a-12a.

[3] *See, e.g., United States v. Pelican*, 232 U.S. 442, 445-46 (1914); *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 330 (1942); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354-55 (1962); *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973); *DeCoteau v. District County Court*, 420 U.S. 425, 426-27, 446 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 & n.5 (1977); *Solem v. Bartlett*, 465 U.S. at 475 (1984).

note, *Solem* described as supportive of diminishment, but not dispositive, certain "isolated phrases," including the term "public domain," only used to describe lands in which tribal members would retain timbering rights. 465 U.S. at 475 & n.17. Justice Marshall's opinion for the *Solem* Court stressed the statutory preservation of significant tribal interests in the lands, reserved interests that markedly distinguish the lands from lands fully restored to the public domain. *Compare id.* at 474-75 *with infra* at 8-9. Moreover, *Solem* does not retreat from earlier decisions, it discusses with approval each of this Court's modern disestablishment cases. 465 U.S. at 469-70 n.10. Consequently, the conclusion of the court below that *Solem* renders the phrase "restored to the public domain" ambiguous conflicts with *Solem*, and certiorari should be granted to resolve that conflict.

The decision below conflicts with this Court's historic interpretation of the phrase "restored to the public domain." [4] From its decision in *United States v. Pelican*, 232 U.S. 442, 445-46 (1914), decided only six years after passage of the 1908 Act that assertedly is applicable to Santa Fe's lands, through its most recent examination of the phrase in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589, 618 (1977), this Court, without dissent, has interpreted "restored to the public domain" as "clear language of express termination." *Mattz*, 412 U.S. at 504 n.22.

In *United States v. Pelican*, 232 U.S. 442, 445-46 (1914), this Court recognized that lands restored to the public domain cannot retain reservation status. *Pelican*

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[4] Recognizing that the 1897 Act employed the phrase "open[ed] for entry under all the land laws of the United States . . .", Pet. App. 313a, Santa Fe reads the District Courts opinion and the Court of Appeals' panel and *en banc* opinions as considering the 1894 Act's directive that Uncompahagre lands be "restored to the public domain" to embody Congressional intentions subsequently carried forward and executed in the analogous provisions of the 1897 Act. *See infra* at 16 n.16.

involved the Colville Reservation, set apart by Executive Order on July 2, 1872, which the Court observed "was a legally constituted reservation . . . [inasmuch as] it had been segregated from the public domain." 232 U.S. at 445. *Pelican* construed the Act of July 1, 1892, ch. 140, 27 Stat. 62, adopted just two years before the 1894 Act in this case, providing that the north half of the Colville Reservation, following the grant of allotments, was to be "vacated and restored to the public domain" and opened to settlement and entry. 232 U.S. at 445-46. Justice Hughes, for a unanimous Court, construed the 1892 Act as having "diminished" the Colville Reservation. 232 U.S. at 449. Since 1914, this Court has embraced the 1892 Act as a clear example of statutory language of express termination. *See Seymour*, 368 U.S. at 354-56; Petition, 14.

Restoration to the public domain again was held to have terminated reservation status in *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), concerning Executive Orders of Presidents Hayes in 1879 and Arthur in 1884 that ordered portions of four earlier Executive Order reservations of the Sioux Tribe "restored to the public domain." *See* 316 U.S. at 322-23, I Kappler 884-85, 899 (1904 ed.). This Court interpreted these Executive Orders as "cancelling or revoking" the Executive Orders establishing them. *Id.* at 330.[4a] Although it addressed whether the Sioux Tribe had a compensable interest in the lands, the Court's unanimous opinion reflects the conclusion that the restoration of lands to the public domain cancels *in toto* the prior reservation: "the executive orders of 1879 and 1884 terminated the reser-

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[4a] The term "vacated," present in the 1892 Act in *Pelican*, did not appear in the Executive Orders construed in *Sioux Tribe*; moreover, *Sioux Tribe* describes the Act of July 1, 1892, at issue in *Pelican* and discussed in *Seymour* and its progeny, as an act "to restore [lands] to the public domain," that was intended to "abolish a portion of the Colville Reservation . . .". 316 U.S. at 328-29.

vation . . .". 316 U.S. at 330.[5] The decision below conflicts with the Court's decisions interpreting the phrase "restored to the public domain" over the past 70 years.

B. The Decision Below Conflicts with Recognized Principles of Public Land Law and Decisions of this Court Requiring Regard for Contemporaneous Understandings in the Interpretation of Statutes.

The Court's decisions interpreting the phrase "restored to the public domain" are founded upon longstanding principles of public land law uniformly understood by this Court, Congress, Executive officials, and people and businesses concerned with the management or disposition of public lands during the period when the 1894 and 1897 Acts were considered and enacted. Two years before passage of the 1894 Act, this Court recognized that, "'[p]ublic land' means such land as is open to sale or disposition under general laws. *All land, to which any claims or rights of others have attached, does not fall within the designation of 'public land'.*" *Bardon v. Northern Pacific Railroad Co.*, 145 U.S. 535, 537 (1982) (emphasis supplied); *see also* I Lindley on *Mines* § 80 at 82 (1897). In *Bardon*, Justice Field contrasted lands "severed from the mass of public lands," to which "no sub-

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[5] The Executive Order reservations in *Sioux Tribe* were intended to serve a limited purpose of suppressing the introduction of liquor. 316 U.S. at 320. The Court quoted a June 27, 1879 letter from the Commissioner of Indian Affairs to the Secretary of the Interior that makes clear the administrative intention that the 1879 and 1884 Executive Orders would divest the area of "Indian country" status, not just affect land title:

> At the time said lands were set apart there was no law providing a punishment for the sale of liquor to Indians "except to Indians in the Indian country," but, by the Act of February 27, 1877, (19 Stat. 244) persons who now engage in liquor traffic with Indians, no matter in what locality, are liat [to penalty and imprisonment], and, therefore, the necessity for so large a reservation . . . does not now exist.

316 U.S. at 322.

strued to embrace," from those "restore[d] . . . to the public domain," which are subject to appropriation as public lands.[6] 145 U.S. at 538. The majority and concurring opinions of the Court of Appeals do not reconcile their interpretations of the phrase "restored to the public domain" with the Court's contemporaneous and clearly related public land law decisions.

Public land law principles specifically pertinent to interpretation of the 1894 and 1897 Acts were described in plain terms by the United States Public Land Commission in reports prepared pursuant to the Acts of March 3, 1879, 20 Stat. 377, 394, and June 16, 1880, 21 Stat. 238, 245. The Public Land Law Commission, composed of the Commissioner of the General Land Office, the Director of the United States Geological Survey, and three civilians appointed by the President, was charged statutorily to study the federal public land system and to make "such recommendations as [it] may deem wise in relation to the best method of disposition of the public lands . . .". 20 Stat. at 394. The Commission's published 1880 report, *The Public Domain*, recognized procedures for designating the various uses of public lands, including a "Procedure in Abolishing an Indian Reservation":

> When [an Executive Order Indian] reservation is no longer required, and the President is so informed by the Secretary of the Interior, an Executive order is issued *restoring the lands to the public domain*, . . . after which the lands are disposed of as other public lands.

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[6] Thus, when Congress "restored [lands] to the public domain" it intended, since it is presumed to understand the law, *Albernaz v. United States*, 450 U.S. 333, 341 (1981), to return those unallotted lands to the "mass of public lands." *See Hastings & Dakota Railroad v. Whitney*, 132 U.S. 357, 360-61 (1889). Thereafter, those lands were "held in trust for all the people," *Causey v. United States*, 240 U.S. 399, 401 (1916), not just the Uncompahgre Band.

United States Public Land Commission, Committee on Codification, *The Public Domain* 243 (U.S.G.P.O. 1880); H. Exec. Doc. 47, Part 4, 46th Cong., 3d Sess. (1881); H.R. Misc. Doc. 45, Part 4, 47th Cong., 2d Sess. 243 (1884). This Court has recognized the Commission's reports as authoritative. *Eastern Band of the Cherokee Indians v. United States*, 117 U.S. 288, 300 (1886). This report, concluding that an Executive Order restoring Executive Order Indian reservation land to the public domain would "abolish" the reservation, is compelling evidence that the decision below conflicts with this Court's requirement that Indian statutes "must be read in light of common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

The treatment of the Executive Order 709-744 Area, in which Santa Fe's lands are located, further reflects this uniform, contemporaneous understanding. Lands that the administrative record reflects were temporarily set aside in 1907 to facilitate granting allotments to individual Navajo Indians were subsequently "restored to the public domain" by the 1908 Act[7] and Executive Orders 1000 and 1284.[8] Approximately a year after Executive Order 1284 had ordered the western lands "restored to

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[7] The 1908 Act provides:

> That whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation [in the area created by the 1907 and 1908 Executive Orders] have been allotted, the surplus lands in such part of the reservation *shall be restored to the public domain and opened to settlement and entry by proclamation of the President.*

Act of May 29, 1908, § 25, 35 Stat. 444, 457, S.F. App. 1a (emphasis supplied).

[8] Executive Orders 1000 and 1284 both ordered that unallotted lands in the Executive Order 709-744 Area be "hereby restored to the public domain." Executive Order 1000 (December 30, 1908) restored unallotted lands in the eastern portion of the Executive Order 709-744 Area, while Executive Order 1284 (January 16, 1911) restored unallotted lands in the western portion. S.F. App. 2a-3a.

the public domain," President Taft issued Executive Order 1483 on February 17, 1912, which returned certain lands within the Executive Order 709-744 Area to Executive Order reservation status to complete a proposed land exchange. *See* S. Doc. No. 64, 72d Cong., 1st Sess. 31 (1932). Significantly, Executive Order 1483 provided that a new reservation was required because the lands to be exchanged had been "eliminated from [the Navajo] . . . reservation by Executive Order [1284] of January 16, 1911 . . .". S.F. App. 3a. The issuance of Executive Order 1483, by the same President who issued Executive Order 1284, demonstrates a clear understanding that lands "restored to the public domain" were thereby eliminated from the reservation.[9] Subsequent treatment of the Executive Order 709-744 Area reinforces that federal officials uniformly understood that lands "restored to the public domain" were stripped of reservation status.[10]

The decision below conflicts with these contemporaneous understandings that the phrase "restored to the public domain" would "abolish" a reservation or "eliminate" lands from it, thus constituting "language evidencing the present and total surrender of all tribal interests" and terminating reservation status. *Solem*, 465 U.S. at 470. Certiorari should be granted to address the conflict

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[9] President Taft's issuance of Executive Order 1483, within one year of Executive Order 1284, bears a striking similarity to action by President Theodore Roosevelt acknowledged by this Court in *Rosebud* as a "contemporaneous statement, by the Nation's Chief Executive, of a perceived disestablishment . . .". 430 U.S. at 602-03.

[10] *See, e.g.*, S. Doc. No. 64, 72d Cong., 1st Sess. 31-34 (1932); Hearings before a Subcommittee of the Senate Committee on Indian Affairs, *Survey of Conditions of the Indians in the United States*, 71st Cong., 3rd Sess. 9592 (1931); H.R. 14658, 72nd Cong., 2d Sess. (1933); S. 5628, 72nd Cong., 2d Sess. (1933); H.R. 6542, 74th Cong., 1st Sess. (1935); S. 2213, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1451, 73rd Cong., 2d Sess. 1-2 (1934); Hearings before a Subcommittee of the Senate Committee on Indian Affairs, *Survey of Conditions of the Indians in the United States*, Part 34, 75th Cong., 1st Sess. 17421 (1936).

between decisions of this Court mandating regard for such "common notions of the day" and the decision below.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT BECAUSE IT FAILS TO CONSTRUE THE UNCOMPAHGRE ACTS IN LIGHT OF SURROUNDING CIRCUMSTANCES AND DISREGARDS CLEAR EXPRESSIONS OF CONGRESSIONAL INTENTION TO DISESTABLISH.

Foregoing the comprehensive inquiry prescribed by the decisions of this Court, the majority and concurring opinions below fashioned a narrow and superficial analysis of reservation disestablishment. The Court of Appeals overturned the District Court's painstaking and thorough analysis of Uncompahgre Reservation history without questioning its conclusions that contemporaneous materials reflect no intention that the Uncompahgre Reservation would survive the 1894 and 1897 Acts. Rather, the Tenth Circuit rested its reversal on the perceived absence of an express statutory statement of intention to terminate reservation boundaries, an intention not stated in any of the surplus land acts construed to have diminished reservations by this Court.[11] Consequently, the court below ignored compelling statutory language, legislative history, circumstances surrounding passage of the relevant statutes, and subsequent history and treatment of the area by Congress and Executive officials.

The court below misunderstood what *Solem* described as the "fairly clean analytical structure" this Court's decisions have delineated for distinguishing acts "that

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[11] The *en banc* majority states, "we conclude there are no express references to boundary changes or disestablishment in the language of the 1894 or 1897 Acts." Pet. App. 14a. The concurring opinion, conceding that there was no indication of a Congressional intention that the reservation would survive, Pet. App. 24a, and that after 1897 the Uncompahgre Band had no continuing interest in the lands, Pet. App. 22a n.7, nonetheless found Congress had not disestablished the reservation because it "never clearly evinced an intention to disestablish the Uncompahgre Reservation boundaries . . .". Pet. App. 26a.

diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Solem*, 465 U.S. at 470; *accord*, *Rosebud*, 430 U.S. at 597. That judgment must be drawn from "the language of the act *and* circumstances underlying its passage." *Solem*, 465 U.S. at 469 (emphasis supplied). "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests . . ." may suffice; however, even if restoration of the reservation lands to the public domain did not divest all tribal interests,

> explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land act . . . unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink . . ., *we have been willing to infer* that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

465 U.S. at 469, 471 (emphasis supplied).[12] *Solem*, therefore, refutes the Court of Appeals' interpretation of it as requiring statutory references to boundary changes or disestablishment. *See* footnote 12, *supra*. Because the District Court's published opinion amply satisfied *Solem*, certiorari should be granted to clarify that no greater showing of intention to disestablish is required.

Solem's provision for a comprehensive review mirrors that required by the Court's earlier decisions. In *Mattz*

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[12] That the court below failed to examine contemporaneous understandings is illustrated by contrasting the Tenth Circuit's conclusion that the 1894 Act was ambiguous with legislative history to the contrary. During debate on the 1897 Act, Senator Vest of Missouri stated, in reference to the 1894 Act: "There never was a plainer statute. Everybody understood it and concluded that that was the end of the whole question." 30 Cong. Rec. 719, 55th Cong., 1st Sess. (April 14, 1897).

v. Arnett, 412 U.S. 481, 505 (1973), the Court recognized that: "A congressional determination to terminate must be expressed on the face of the Act *or* be clear from the surrounding circumstances and legislative history" and may be "reinforced by repeated recognition of the reservation status of land . . . by the Department of the Interior and by Congress." (emphasis supplied); *see also DeCoteau*, 420 U.S. at 444-45; *Rosebud*, 430 U.S. at 597-98. Apparently believing that *Solem* discarded these principles, the decision below "erroneously seizes upon several factors and presents them as apparent absolutes." *Rosebud*, 430 U.S. at 588 n.4. Even if the language of the 1894 and 1897 Acts were insufficient alone, "the notion that . . . express [termination] language in an Act is the *only* method by which congressional action may result in disestablishment is quite inconsistent with" the *Mattz* standard. *Id.* (emphasis in original). The narrow focus of the majority and concurring opinions below cannot be reconciled with these principles.

The limited inquiry of the court below led it to ignore operative statutory language, legislative history, and other surrounding circumstances reflecting a clear and unambiguous intention of Congress to terminate the Uncompahgre Reservation. The Uncompahgre Reservation was established by Executive Order dated January 5, 1882, following statutory ratification of an 1880 Agreement between several bands of the Ute Indian Tribe and the United States. Act of June 15, 1880, ch. 223, 21 Stat. 199, Pet. App. 294a ("1880 Act").[13] The 1880 Agreement provided that the Uncompahgre Band be removed from its earlier reservation in Colorado to "unoccupied

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[13] Thus, the nature of rights created by the 1882 Executive Order reservation is defined by the 1880 Act. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (power to issue an executive order "must stem either from an act of Congress or from the Constitution itself"); *United States v. Midwest Oil Co.*, 236 U.S. 459, 473-74 (1915).

agricultural lands as may be found . . . in the Territory of Utah." 21 Stat. 200, Pet. App. 297a. Section 3 of the 1880 Act directed the Secretary of the Interior to make allotments "in severalty" to individual tribal members. 21 Stat. 203, Pet. App. 305a. And, Section 4 of the 1880 Act portends that the Uncompahgre Band would not reside in a permanent reservation: "[U]pon the completion of said allotments . . . said Indians shall be subject . . . to the laws, both civil and criminal, of the State or Territory in which they may reside, with the right to sue and be sued in the courts thereof. . . . ". 21 Stat. at 204, Pet. App. 306a; *cf. South Carolina v. Catawba Indian Tribe*, No. 84-782, slip op. 6-10 (U.S.S.Ct., June 2, 1986) (statute providing "the laws of the several States shall apply to [members of terminated tribe] in the same manner they apply to other persons or citizens. . ."). This original intention and subsequent Congressional adherence to it led the District Court below to conclude that the Uncompahgre Reservation was intended to be "a temporary reservation," to last only until allotments were granted to individual Uncompahgre Indians. Pet. App. 170a, 181a.

The 1894 Act effected the terms of the 1880 Act by providing that, after allotments were made, the unallotted lands of the Uncompahgre Reservation shall be "restored to the public domain." [14] Pet. App. 311a. The Court of Appeals' holding that the 1894 Act did not embody a "baseline purpose of disestablishment," [15] that was "car-

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[14] The District Court correctly considered the nature and purpose of the Uncompahgre Reservation material to interpreting statutes arguably terminating it, quoting the Commission of Indian Affairs' July 18, 1884 memorandum: "I do not think [the Uncompahgre Reservation] was intended as a permanent reservation, and I presume that whenever the Indians are settled upon their allotments, the reservation as present [sic] existing will be discontinued." *Quoted*, Pet. App. 181a. Referring to the quoted language, Judge Jenkins held that "the 1894 Act was intended to fulfill that purpose, releasing the remaining lands for non-Indian exploitation . . .". *Id.*

[15] Incongruously, the Tenth Circuit construed the Act of May 24, 1888, ch. 310, § 1, 25 Stat. 157 ("1888 Act"), which declared

ried forth and enacted" by passage of the 1897 Act,[16] is untenable. *See Rosebud*, 430 U.S. at 592; Point I, *supra*. The majority and concurring opinions do not challenge conclusions of the District Court that the Ute Tribe "cites no statement by the proponents of the 1897 Act indicating that the Uncompahgre Reservation was intended to survive the opening, and this court has found none," Pet. App. 183a, and that "[t]he record in this case offers no jurisdictional history contrary to the view that the 1882 boundaries were dissolved in 1897." Pet. App. 184a. Even if the decision below were correct that the operative language of the 1894 Act alone did not express an intention to effect disestablishment, surrounding circumstances unequivocally reflect an intention to disestablish. The Tenth Circuit's reversal of Judge Jenkins' concededly "thoughtful" opinion, Pet. App. 24a, without advancing legislative history or surrounding circumstances affirmatively indicating an intention that reservation status would continue, conflicts with the disestablishment decisions of this Court[17] and with the Court's very

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lands described as the Gilsonite Strip in the Uintah Reservation "to be public lands of the United States and restored to the public domain," Pet. App. 309a-10a, as "explicit": "Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip." Pet. App. 24a. As the Petition suggests, this is flatly inconsistent with the holding that "restored to the public domain" in the 1894 Act is ambiguous. *See* Pet. App. 18a.

[16] The *en banc* majority opinion does not question that any intention to disestablish in the 1894 Act was carried forward in the 1897 Act. *See* Pet. App. 8a-14a. The concurring opinion does not reject the District Court opinion on this point, it only states that ambiguity found in the term "public domain" "is only heightened by its subsequent exclusion from the 1897 Act." Pet. App. 18a. In any event, the District Court's conclusion that "the main thrust of the 1897 Act was to mandate the execution of the purposes of the 1894 Act by the Executive Branch," Pet. App. 182a, is well supported. *See* Pet. App. 175a-183a; Petition, 22-25.

[17] The decision below also does not refute the trial court's determination that administrative interpretations reflect a widely-held understanding that the 1894 and 1897 Acts terminated reservation

recent admonition that Indian lands legislation not be given an interpretation "that conflicts with the [statute's] central purpose and philosophy . . . .". *South Carolina v. Catawba Indian Tribe*, slip op. 8-9.

The court below brushed aside the logical inconsistency of its opinion with the Act of March 11, 1948, 62 Stat. 72 ("1948 Act"), which extended the exterior boundaries of the Uintah and Ouray Reservation into an area that fell "largely within the original boundaries of the Uncompahgre Reservation." [18] Pet. App. 186a. The concurring opinion acknowledged that the 1948 Act "seems irreconcilable with continued reservation status . . ."; however, it ignored the clear statement of Congressional intent that no reservation then existed. Pet. App. 25a. The majority opinion fails to recognize the incongruity of Congress' creation of a new reservation within an area that the 1948 Act refers to as "the former Uncompahgre Indian Reservation." 1948 Act § 2, Pet. App. 363a. *See* Pet. App. 13a. The Tenth Circuit's indifference to the clear premise of the 1948 Act that the "former" Uncompahgre Reservation had been terminated conflicts

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status, *see* Pet. App. 190a, disregarding well-established decisions of this Court that require courts to defer to uniform, contemporaneous, and long-standing Interior Department administrative interpretations respecting Indian lands. In *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 105 S. Ct. 2587, 2597-98 (1985), this Court recognized that Executive officials "responsible for administering the statute[s] . . . were far more likely to have had an understanding of the actual intent of Congress than judges who must consider the legal implications of the transaction over half a century after it occurred." The Tenth Circuit's failure to interpret the 1894 and 1897 Acts to give effect to the clear intentions of Congress and consistent understandings of Executive officials should not be condoned. As *DeCoteau* observed, "[Courts] cannot remake history." 420 U.S. at 449.

[18] That Congress intended to extend boundaries by the 1948 Act, and not merely to acquire title to lands, is demonstrated by H.R. Rep. No. 1372, 80th Cong., 2d Sess. 1-2 (1948), where the oCmmittee on Public Lands described the purpose of the legislation to "enlarge" the Uintah Reservation by over 500,000 acres, including "some 31,000 acres of land purchased for Indian use." *Id.* at 2.

with this Court's careful analysis of comparable legislation. *See Rosebud*, 430 U.S. at 604 n. 27; *Seymour*, 368 U.S. at 356.

Finally, the decision below runs counter to decisions of this Court requiring consideration of pertinent federal policies at the time of passage of the 1894 and 1897 Acts. *See Oliphant*, 435 U.S. at 206; *DeCoteau*, 420 U.S. at 431-32. As this Court stated in *Solem*:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.

465 U.S. at 468, *citing Bates v. Clark*, 95 U.S. 204 (1877). Because land title and Indian property interests, and not reservation boundaries, were then considered determinative of jurisdictional issues, a congressional intention to terminate all Indian interests in lands should be interpreted as reflecting a concommittant intention *pro tanto* to diminish the affected reservation.[19] This absence of remaining tribal interests is especially significant where, as here, tribal *civil* jurisdiction over non-Indians is asserted, and not merely the reach of federal criminal laws following "uncoupl[ing] of reservation status from Indian ownership" by the Act of June 25, 1948, ch. 645, 62 Stat. 757, codified at 18 U.S.C. § 1151. *Solem*, 465 U.S. at 468.[20]

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[19] In *Solem*, the Cheyenne River Sioux Tribe retained an interest in the proceeds of lands that the Cheyenne River Act ordered the Secretary to sell and disposed of, 465 U.S. at 473, an interest the Uncompahgre Band undisputedly lacked in lands subject to the 1894 and 1897 Acts, as the concurring opinion below recognized. *See* Pet. App. 21a-22a.

[20] If permitted to stand, the decision below threatens a jurisdictional upheaval broader than that resulting from any previous decision of this Court upholding reservation status. The Ute Tribe here

Bates provided the standard to determine the extent of state and federal jurisdiction when the 1894 and 1897 Acts were passed:

> The simple criterion is, that, as to all the lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

95 U.S. at 208. As this Court noted in *Rosebud*, when "Indian title had been extinguished, . . . the jurisdiction of the State . . . was full and complete." 430 U.S. at 613 n. 47, *quoting Dick v. United States*, 208 U.S. 340, 352 (1908).[21] Thus, resolution of questions of title also

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asserts broad civil authority over non-Indians under its comprehensive Law and Order Code. *See* Petition, 10-11; *compare Seymour*, 368 U.S. at 357-58 (criminal jurisdiction under 18 U.S.C. § 1151); *Mattz*, 412 U.S. at 483 (18 U.S.C. § 1151); *and Solem*, 465 U.S. at 465 & n.2 (18 U.S.C. § 1151) *with* Pet. App. 114a-116a. The decision below does not address the central question of the applicability of tribal law to non-Indians on patented lands within the alleged reservation, notwithstanding that this Court has rested its modern disestablishment decisions concerning patented lands on the provision of 18 U.S.C. § 1151(a), which defines "Indian country", as used in federal *criminal* laws, to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent . . .". *See Seymour*, 368 U.S. at 357-58 & n.15. The holding below, assuming without discussion that tribal law generally is applicable on patented lands within an undiminished reservation, raises a further significant question of federal law.

[21] Tribal *amici curiae* in *Rosebud* advised this Court:

> [A]t the time the *Rosebud* statutes [and the 1894 and 1897 Uncompahgre statutes] were enacted, the 'title theory' was dominant. A Congressman then would have assumed . . . that each parcel ceased to be Indian country upon the extinguishment of Indian ownership. The term "diminished" would mean dimin-

was understood to resolve questions of federal, tribal, or state jurisdiction, absent Congress' express provision that federal or tribal jurisdiction was to be preserved.

Because jurisdiction was understood to follow title when the 1894 and 1897 Acts were passed, Congress' undisputed intention to terminate entirely the Uncompahgre Band's interest in the lands should be construed to reflect a further intention to terminate federal or tribal jurisdiction over those lands. That reservation boundaries were not discussed or expressly terminated, therefore, is neither material nor surprising. Certiorari should be granted to address the conflict between the decision below, holding that reservation status adheres in lands considered restored to the public domain in which no tribal interest is preserved, and the decisions of this Court.

CONCLUSION

For the foregoing reasons, *amicus curiae*, Sante Fe Mining, Inc., prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 4th day of June, 1986.

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ished in ownership, not boundaries, since ownership was then thought to be the significant jurisdictional factor.

Brief of *Amici Curiae* National Congress of American Indians, *et al.* 28, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

APPENDIX

APPENDIX

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Act of May 29, 1908, § 25
35 Stat. 444, 457, III Kappler 356, 370 (1913):

That whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona created by Executive orders of November ninth, nineteen hundred and seven, and January twenty-eighth, nineteen hundred and eight, have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.

Executive Order 709, III Kappler 669 (1913 ed.):

It is hereby ordered that the following-described tract of country in the Territories of Arizona and New Mexico, viz:

Commencing at a point where the east line of the Navajo Indian Reservation, as at present constituted, intersects the north boundary of township 23 north, range 13 west, New Mexico meridian; thence due east to the northeast corner of township 23 north, range 5 east; thence south to the southeast corner of township 17 north, range 5 east, New Mexico meridian; thence west to the first guide meridian; thence south on the said guide meridian to the southeast corner of township 15 north, range 9 west; thence west to the southwest corner of township 15 north, range 14 west; thence north to the northwest corner of township 15 north, range 14 west; thence due west to the boundary line between the Territories of Arizona and New Mexico; thence south on the boundary line between the Territories of Arizona and New Mexico to the northeast corner of township 23 north, range 31 east; thence west to the northwest corner of township 23 north, range 29 east; thence south to the northwest corner of township 21 north, range 29 east;

thence west to the northwest corner of township 21 north, range 29 east; thence west to the northwest corner of township 21 north, range 26 east; thence south to the southeast corner of township 21 north, range 25 east; thence west to the southwest corner of township 21 north, range 22 east; thence due north to the southern boundary of the Navajo Reservation, as at present constituted, be, and the same is hereby, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the present Navajo Reservation: *Provided*, That this withdrawal shall not affect any existing valid rights of any person.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *November 9, 1907.*

Exectuive Order 1000, III Kappler 685 (1913 ed.):

It is hereby ordered that the unallotted lands in Tps. 17, 18, 19, 20, and 21 N., Rs. 5, 6, 7, and 8 W., and Tps. 22 and 23 N., Rs. 6, 7, and 8 W. of the New Mexico principal meridian, withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the Navajo Reservation by Executive orders dated November 9, 1907, and January 28, 1908, be, and the same are hereby, restored to the public domain, except the following-described lands, embracing 110 unapproved allotments, namely:

The SW. ¼ of sec. 23, T. 17 N., R. 5 W.; the S. ½ of sec. 35, T. 18 N., R. 5 W.; sec. 23 and the N. ½ of sec. 25, T. 19 N., R. 5 W.; the W. ½ of sec. 5 and the E. ½ of sec. 6, T. 20 N., R. 6 W., unsurveyed; the NW. ¼ of sec. 3; the NE. ¼ of sec. 4, the S. ½ of sec. 5, the N.W. ¼ of sec. 8, sec. 17, the N. ½ of sec. 19, sec. 20, and the SE. ¼ of sec. 31, T. 21 N., R. 6 W.; the W. ½ of sec. 33, the S. ½ of sec. 34, and the W. ½ of sec. 35, T. 22 N., R. 6 W.; the N. ½ of sec. 3, sec. 4, the W. ½ and the SE. ¼ of sec. 7, the SE. ¼ of sec. 8, sec. 9, the W. ½ of sec. 16, secs. 17 and 18, the N. ½ and the SE. ¼

of sec. 19, sec. 20, the W. ½ of sec. 21, the E. ½ of sec. 22, sec. 23, the NW. ¼ of sec. 28, the N. ½ of sec. 29, and the NE. ¼ of sec. 30, T. 20 N., R. 7 W.; the W. ½ of sec. —, the SE. ¼ of sec. 19, the S.W. ¼ of sec. 20, the N. ½ and the SE. ¼ of sec. 24, the E. ½ of sec. 25, the SW. ¼ of sec. 26, the S. ½ of sec. 27, the SE. ¼ of sec. 28, the NW. ¼ of sec. 29, the NE. ¼ of sec. 30, the E. ½ of sec. 33, sec. 34, and the W. ½ of sec. 35, T. 21 N., R. 7 W., and secs. 1 and 12 and the SE. ¼ of sec. 11, T. 21 N., R. 8 W. of the New Mexico principal meridian.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *December 30, 1908.*

Executive Order 1284, III Kappler 686 (1913 ed.):

It is hereby ordered that all lands not allotted to Indians or otherwise reserved within the townships in New Mexico added to the Navajo Reservation by Executive orders of November 9, 1907 and January 28, 1908, lying west of the first guide meridian west, be and the same hereby are restored to the public domain.

WM. H. TAFT.

THE WHITE HOUSE, *January 16, 1911.*

Executive Order 1483, III Kappler 686 (1913 ed.):

It is hereby ordered that the following-described lands in New Mexico, being a part of the lands heretofore set aside as an executive reservation for the Navajo Indians and eliminated from said reservation by Executive order of January 16, 1911, be, and the same are hereby, restored to the status existing before said order of January 16, 1911, the purpose being to admit of the consummation of an exchange under the act of April 21, 1904 (33 Stats. at Large, p. 211), initiated prior to said elimination, viz: All odd-numbered sections in T. 22 N., R. 11

and 12 W., New Mexico principal meridian; and it is further ordered that upon completion of said exchange and after allotment to the Indians, any remaining lands shall be opened to disposition by the Secretary of the Interior in such manner and after such notice as he may prescribe.

WM. H. TAFT.

THE WHITE HOUSE, *February 17, 1912.*